

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 21, 1997

UNITED STATES OF AMERICA,	)	
Complainant	)	
	)	8 U.S.C. 1324a Proceeding
vs.	)	
	)	OCAHO Case No. 97A00080
WITH YOU APPAREL, INC.	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Background

On October 28, 1996, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon With You Apparel, Inc. (respondent) Notice of Intent to Fine NYC 96 EO 000328. That citation contained two (2) counts alleging 76 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a, for which civil money penalties totaling \$29,180 were assessed.

In Count I, complainant alleged that respondent had violated the provisions of 8 U.S.C. 1324a(a)(1)(B) by having failed to ensure proper completion of section 1 and also by having failed to properly complete section 2 of the Forms I-9 for each of the 56 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of \$490 were assessed for each of 12 of those alleged violations and \$360 for each of the remaining 44 alleged violations, for a total of \$21,720.

In Count II, complainant alleged that respondent had hired the 20 individuals named therein after November 6, 1986, for employment in the United States and that respondent failed to ensure proper completion of section 1 of the pertinent Forms I-9, in violation of 8 U.S.C. 1324a(a)(1)(B). Civil money penalties of \$490 were assessed for each of two (2) of those alleged violations and \$360 for each of the remaining 18 alleged violations, for a total of \$7,460.

The wording of the NIF clearly advised the respondent of its right to file a written request for a hearing before an Administrative Law Judge assigned to this Office provided that such written request be filed within 30 days of its receipt of the NIF.

On November 19, 1996, respondent timely filed a written request for hearing.

On April 2, 1997, complainant filed the two (2)–count Complaint at issue, realleging the 76 violations set forth in Counts I and II of the NIF, as well as the requested \$29,180 total civil money penalties sum.

On April 7, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of the Complaint at issue, were served upon respondent.

On May 12, 1997, respondent timely filed an answer. In that responsive pleading, respondent neither denied nor admitted the allegations in the Complaint, but denied the appropriateness of complainant's proposed total civil money penalties sum of \$29,180 and recommended a civil money penalty sum of \$2,000, citing the five (5) statutory factors enumerated at 8 U.S.C. 1324a(e)(5), 8 C.F.R. 274a.10 (1996).

On May 19, 1997, complainant filed a pleading captioned Motion for Summary as to Liability requesting that summary decision be granted in its favor on the grounds that it is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

On June 5, 1997, a telephonic prehearing conference was conducted, during the course of which respondent's counsel, Jin Cao, Esquire, advised that his client had admitted liability for the 76 paperwork violations contained in the Complaint. Complainant was directed to supplement its motion for summary decision by filing copies of the 76 pertinent Forms I–9, also.

On June 20, 1997, complainant filed a pleading captioned Complainant's Amended Motion for Summary Decision as to Liability, together with the declaration of Special Agent Aaron Schultz and copies of the 76 pertinent Forms I–9.

## II. Standards of Decision

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that [t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 28 C.F.R. 68.38(c) (1996).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. United States v. Limon–Perez, 5 OCAHO 796, at 5, aff'd, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact and is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as an inexpensive determination of every action. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Alberta Sosa, Inc., 5 OCAHO 739, at 5 (1994).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994).

Once the movant has carried this burden, the opposing party must then come forward with specific facts showing that there is a genuine issue for trial. Id.; Fed. R. Civ. P. 56(e). The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial. 28 C.F.R. 68.38(b) (1996).

Summary decision may properly be based on matters deemed admitted, also. United States v. Anchor Seafood Distribs., Inc., 4 OCAHO 718, at 5 (1994); United States v. Primera Enters., Inc., 4 OCAHO 615, at 3 (1994).

### III. Discussion

As noted earlier, respondent failed to deny any of the allegations set forth in the two (2)–Count Complaint. The procedural regulation, 28 C.F.R. 68.9 (c) (1996), provides in pertinent part:

Any respondent contesting any material fact alleged in a complaint, or contending that the amount of the proposed penalty or award is excessive or inappropriate, or contending that she/he is entitled to judgment as a matter of law, shall file an answer in writing. The answer shall include:

- (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation

not expressly denied shall be deemed to be admitted.

It is therefore found that respondent has admitted all of the allegations set forth in Counts I and II of the Complaint.

Moreover, complainant has provided copies of the 76 pertinent Forms I-9, which INS Special Agent Aaron Schultz has declared, under penalty of perjury, to be true and accurate copies of the Forms I-9 relating to the 76 individuals named in Counts I and II.

A review of the Forms I-9 for the 56 individuals named in Count I indicates that section 1 and section 2 were not completed properly in the manner complainant has alleged. A review of the Forms I-9 for the 20 individuals named in Count II indicates that section 1 was not completed properly in the manner complainant has alleged.

Therefore, because complainant has demonstrated that there is no genuine issue of material fact with regard to the violations set forth in Counts I and II, and because respondent has admitted liability for those 76 facts of violation and has failed to show that there is a genuine issue of fact for trial, complainant's Motion for Summary Decision is hereby granted as it pertains to respondent's liability for the 76 section 1324a(a)(1)(B) facts of violation alleged in Counts I and II.

In lieu of conducting an evidentiary hearing on the sole remaining issue, that of assessing the appropriate civil money penalties for these 76 violations, the parties are hereby instructed to submit concurrent written briefs, to be filed no later than Friday, August 22, 1997, containing recommended civil money penalty amounts for those violations, utilizing the five (5) criteria listed at 8 U.S.C. 1324a(e)(5), 8 C.F.R. 274a.10(b)(2) (1996).

Joseph E. McGuire  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1997, I have served copies of the foregoing Order Granting Complainant's Motion for Summary Decision to the following persons at the addresses shown, via regular mail, unless otherwise indicated:

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